



Billing Code 7405-01-S

OFFICE OF SPECIAL COUNSEL

5 CFR Part 1800

Filing of Complaints of Prohibited Personnel Practices or other Prohibited Activities and Filing Disclosures of Information

AGENCY: U.S. Office of Special Counsel.

ACTION: Notice of proposed rulemaking and related information collection activity.

SUMMARY: The U.S. Office of Special Counsel (OSC) proposes to revise its regulations regarding the filing of complaints and disclosures with OSC, and also to update the prohibited personnel practice provisions. In accordance with the Paperwork Reduction Act of 1995, and implementing Office of Management and Budget (OMB) regulations, OSC has also requested approval from OMB for a new, dynamic electronic form to be used for filing complaints and disclosures. This new form will replace Forms OSC-11, OSC-12, and OSC-13, which were previously approved by OMB. Access to the new electronic form relevant to this proposed rule has been submitted to the OMB for review.

DATES: Written comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Note, however, that OMB is required to act on the collection of information discussed in this proposed rule between

30 and 60 days after this notice's publication in the Federal Register. Therefore, comments are best assured of having full effect if received by OMB within 30 days of this notice's publication in the Federal Register.

ADDRESSES: You may submit comments by any of methods listed below. Comments received may be posted to <http://www.regulations.gov>.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments;
- Office of Information and Regulatory Affairs, Office of Management and Budget, by email via: oir-submissions@omb.eop.gov; or to
- Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for OSC, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kenneth Hendricks, Associate General Counsel, U.S. Office of Special Counsel, by telephone at 202-254-3600, by facsimile at (202) 254-3711, or by email at khendricks@osc.gov.

SUPPLEMENTARY INFORMATION:

Background

The proposed rule makes minor changes to the existing language in 5 CFR 1800.1(c)(1) through (5) and (d), and 1800.2(b)(1) and (2) by replacing references to, and information about, the old OSC forms with references to, and information about, forms established by OSC. The language in the proposed rule refers to forms established by

OSC, and it covers the new form that OSC submitted to OMB for approval. The proposed rule will enable us to revise our forms in the future, while still providing for public notice and OMB's review of future revisions. The proposed rule also updates the prohibited personnel practice provisions, at 5 CFR 1800.1(a)(13), based on the requirements of 5 U.S.C. 2302(b)(13) regarding nondisclosure forms, policies, or agreements. Comments are invited on the proposed rule and the new form.

OSC is an independent agency responsible for, among other things, (1) investigation of allegations of prohibited personnel practices defined by law at 5 U.S.C. 2302(b), protection of whistleblowers, and certain other illegal employment practices under titles 5 and 38 of the U.S. Code, affecting current or former Federal employees or applicants for employment, and covered state and local government employees; and (2) the interpretation and enforcement of Hatch Act provisions on political activity in chapters 15 and 73 of title 5 of the U.S. Code.

Procedural Determinations

Administrative Procedure Act (APA): This action is taken under the Special Counsel's authority at 5 U.S.C. 1212(e) to publish regulations in the Federal Register.

Executive Order 12866 (Regulatory Planning and Review): OSC does not anticipate that this proposed rule will have significant economic impact, raise novel issues, and/or have any other significant impacts. Thus this proposed rule is not a significant regulatory action under 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under 6(a)(3) of the Order.

Congressional Review Act (CRA): OSC has determined that this proposed rule is not a major rule under the Congressional Review Act, as it is unlikely to result in an annual effect on the economy of \$100 million or more; is unlikely to result in a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies or geographic regions; and is unlikely to have a significant adverse effect on competition, employment, investment, productivity, or innovation, or on the ability of U.S.-based enterprises to compete in domestic and export markets.

Regulatory Flexibility Act (RFA): The Regulatory Flexibility Act does not apply, even though this proposed rule is being offered for notice and comment procedures under the APA. This proposed rule will not directly regulate small entities. OSC therefore need not perform a regulatory flexibility analysis of small entity impacts.

Unfunded Mandates Reform Act (UMRA): This proposed revision does not impose any federal mandates on state, local, or tribal governments, or on the private sector within the meaning of the UMRA.

National Environmental Policy Act (NEPA): This proposed rule will have no physical impact upon the environment and therefore will not require any further review under NEPA.

Paperwork Reduction Act (PRA): As noted above, OSC is submitting this proposed rule and collection to OMB for review pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of OSC functions, including whether the information will have practical utility; (b) the accuracy of OSC's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. The new form can be reviewed at <https://dev.osc.gov/pages/osctest.aspx>.

Title of Collection: Form 14: Electronic Submission of Allegations and Disclosures

Access to the new electronic form is available at: <https://dev.osc.gov/pages/osctest.aspx>.

Type of Information Collection Request: Approval of new collection of information to replace previously-approved collection of information.

Affected Public: Current and former Federal employees, applicants for Federal employment, state and local government employees, and their representatives, and the general public.

Respondent's Obligation: Voluntary.

Estimated Annual Number of Form OSC-14 Respondents: 6000 (estimated prohibited personnel practice filers = 4000; estimated disclosure filers = 1835; and estimated Hatch

Act filers = 165). These estimates are based on a review of recent Annual Reports and an analysis of developing trends for this year.

Frequency of Use of Form OSC-14: Daily.

Estimated Average Amount of Time for a Person To Respond Using Form OSC-14:

For prohibited personnel practice allegations, one hour and 15 minutes; for whistleblower disclosures, one hour; and for Hatch Act allegations, 30 minutes to complete the form in each of the years covered by this request. These estimates are based on testing completed by OSC employees during the development of the collection form.

Estimated Annual Burden for Filing Form OSC-14: 6917.5 hours.

Abstract: The electronic form will be used by current and former Federal employees and applicants for Federal employment to submit allegations of possible prohibited personnel practices or other prohibited activity for investigation and possible prosecution by OSC, or review and possible referral to relevant Inspector General offices.

Executive Order 13132 (Federalism): This proposed revision does not have new federalism implications under Executive Order 13132.

Executive Order 12988 (Civil Justice Reform): This proposed rule meets applicable standards of 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 5 CFR Part 1800

Filing of complaints and allegations.

For the reasons stated in the preamble, OSC proposes to revise 5 CFR part 1800 as follows:

PART 1800 – FILING OF COMPLAINTS AND ALLEGATIONS

1. The authority citation for 5 CFR part 1800 continues to read as follows:

Authority: 5 U.S.C. 1212(e).

2. Section 1800.1 is revised to read as follows:

§ 1800.1 Filing complaints of prohibited personnel practices or other prohibited activities.

(a) *Prohibited personnel practices.* The Office of Special Counsel (OSC) has investigative jurisdiction over the following prohibited personnel practices committed against current or former Federal employees and applicants for Federal employment:

(1) Discrimination, including discrimination based on marital status or political affiliation (see § 1810.1 of this chapter for information about OSC's deferral policy);

(2) Soliciting or considering improper recommendations or statements about individuals requesting, or under consideration for, personnel actions;

(3) Coercing political activity, or engaging in reprisal for refusal to engage in political activity;

(4) Deceiving or obstructing anyone with respect to competition for employment;

(5) Influencing anyone to withdraw from competition to improve or injure the employment prospects of another;

(6) Granting an unauthorized preference or advantage to improve or injure the employment prospects of another;

(7) Nepotism;

(8) Reprisal for whistleblowing (whistleblowing is generally defined as the disclosure of information about a Federal agency by an employee or applicant who reasonably believes that the information shows a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety);

(9) Reprisal for:

(i) Exercising certain appeal rights;

(ii) Providing testimony or other assistance to persons exercising appeal rights;

(iii) Cooperating with the Special Counsel or an Inspector General; or

(iv) Refusing to obey an order that would require the violation of law;

(10) Discrimination based on personal conduct not adverse to job performance;

(11) Violation of a veterans' preference requirement;

(12) Taking or failing to take a personnel action in violation of any law, rule, or regulation implementing or directly concerning merit system principles at 5 U.S.C. 2301(b); and

(13) Implementing or enforcing nondisclosure policies, forms, or agreements that do not contain the statement required by 5 U.S.C. 2302(b)(13).

(b) *Other prohibited activities.* OSC also has investigative jurisdiction over allegations of the following prohibited activities:

(1) Violation of the Federal Hatch Act at title 5 of the U.S. Code, chapter 73, subchapter III;

(2) Violation of the state and local Hatch Act at title 5 of the U.S. Code, chapter 15;

(3) Arbitrary and capricious withholding of information prohibited under the Freedom of Information Act at 5 U.S.C. 552 (except for certain foreign and counterintelligence information);

(4) Activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decision making;

(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action (unless the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure); and

(6) Violation of uniformed services employment and reemployment rights under 38 U.S.C. 4301, et seq.

(c) *Procedures for filing complaints alleging prohibited personnel practices or other prohibited activities (other than the Hatch Act).* (1) Current or former Federal employees, and applicants for Federal employment, may file a complaint with OSC alleging one or more prohibited personnel practices, or other prohibited activities within OSC's investigative jurisdiction. The Form established by OSC must be used to file all such complaints (except those limited to an allegation or allegations of a Hatch Act

violation - see paragraph (d) of this section for information on filing Hatch Act complaints).

(2) Forms filed in connection with allegations of reprisal for whistleblowing must identify:

- (i) Each disclosure involved;
- (ii) The date of each disclosure;
- (iii) The person to whom each disclosure was made; and
- (iv) The type and date of any personnel action that occurred because of each disclosure.

(3) Except for complaints limited to alleged violation(s) of the Hatch Act, OSC will not process a complaint filed in any format other than a completed OSC Form. If a filer does not use the OSC Form to submit a complaint, OSC will provide the filer with information about the Form. The complaint will be considered to be filed on the date on which OSC receives a completed Form.

(4) The OSC Form is available:

- (i) Online, at: <http://www.osc.gov> (to complete online);
- (ii) By calling OSC, at: (800) 872-9855 (toll-free), or (202) 653-7188 (in the Washington, DC area); or
- (iii) By writing to OSC, at: U.S. Office of Special Counsel, Complaints Examining Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505.

(5) A complainant can file a completed Form with OSC by any of the following methods:

(i) Electronically, at: <http://www.osc.gov> (for completion and filing electronically);

(ii) By fax, to: (202) 653–5151; or

(iii) By mail, to: U.S. Office of Special Counsel, Complaints Examining Unit, 1730 M Street NW., Suite 218, Washington, DC 20036–4505.

(d) *Procedures for filing complaints alleging violation of the Hatch Act.* (1)

Complaints alleging a violation of the Hatch Act may be submitted in any written form, but use of the Form established by OSC is encouraged. Complaints should include:

(i) The complainant's name, mailing address, telephone number, and a time when OSC can contact that person about his or her complaint (unless the matter is submitted anonymously);

(ii) The department or agency, location, and organizational unit complained of; and

(iii) A concise description of the actions complained about, names and positions of employees who took the actions, if known to the complainant, and dates of the actions, preferably in chronological order, together with any documentary evidence that the complainant can provide.

(2) The OSC Form for filing a complaint is available as described in paragraphs (c)(4)(i) through (iii) of this section.

(3) A written Hatch Act complaint can be filed with OSC by any of the methods listed in paragraphs (c)(5)(i) through (iii) of this section.

3. Section 1800.2 is revised to read as follows:

§ 1800.2 Filing disclosures of information.

(a) *General.* OSC is authorized by law (at 5 U.S.C. 1213) to provide an independent and secure channel for use by current or former Federal employees and applicants for Federal employment in disclosing information that they reasonably believe shows wrongdoing by a Federal agency. OSC must determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. If it does, the law requires OSC to refer the information to the agency head involved for investigation and a written report on the findings to the Special Counsel. The law does not authorize OSC to investigate the subject of a disclosure.

(b) *Procedures for filing disclosures.* Current or former Federal employees, and applicants for Federal employment, may file a disclosure of the type of information described in paragraph (a) of this section with OSC. Such disclosures must be filed in writing (including electronically - see paragraph (b)(3)(i) of this section).

(1) Filers are encouraged to use the Form established by OSC to file a disclosure of the type of information described in paragraph (a) of this section with OSC. The Form provides more information about OSC jurisdiction, and procedures for processing whistleblower disclosures. The Form is available:

(i) Online, at: <http://www.osc.gov> (to complete online);

(ii) By calling OSC, at: (800) 572-2249 (toll-free), or (202) 653-9125 (in the Washington, DC area); or

(iii) By writing to OSC, at: U.S. Office of Special Counsel, Disclosure Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505.

(2) Filers may use another written format to submit a disclosure to OSC, but the submission should include:

(i) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when OSC can contact that person about his or her disclosure;

(ii) The department or agency, location and organizational unit complained of; and

(iii) A statement as to whether the filer consents to disclosure of his or her identity by OSC to the agency involved, in connection with any OSC referral to that agency.

(3) A disclosure can be filed in writing with OSC by any of the following methods:

(i) Electronically, at: <http://www.osc.gov> (for completion and filing electronically);

(ii) By fax, to: (202) 653-5151; or

(iii) By mail, to: U.S. Office of Special Counsel, Disclosure Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505.

Dated: August 22, 2016.

Mark Cohen,

Principal Deputy Special Counsel

